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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 637

JOHN D. MYERS, PETITIONER

v.

JOHN B. HOLLISTER, DIRECTOR, INTERNATIONAL COOPERATION ADMINISTRATION; PHILIP M. YOUNG, CHAIRMAN, AND GEORGE M. MOORE, FREDERICK J. LAWTON, COMMISSIONERS, UNITED STATES CIVIL SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Pet. App. 16-18; R. 11-13) is not reported. The majority and dissenting opinions of the Court of Appeals for the Dis-

trict of Columbia Circuit (Pet. App. 18-24; R. 14-21) are reported at 226 F. 2d 346.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1955 (R. 22). The time for filing a petition for a writ of certiorari was successively extended to January 27, 1956, by an order of the Chief Justice dated November 30, 1955, by an order of Mr. Justice Reed dated December 29, 1955, and by orders of the Chief Justice dated January 10, 1956 and January 20, 1956. The petition for a writ of certiorari was filed on January 25, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the usual civil service rules governing reductions in force were applicable to the special five percent reduction prescribed by Section 7(f) of the Mutual Security Act of 1952, in view of the proviso in that section that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned".

STATUTES INVOLVED

Section 7(f) of the Mutual Security Act of 1952, 66 Stat. 141, 144, 22 U.S.C. 1655 (d), provides in pertinent part:

> * * * *Provided further,* That, ninety days after the enactment of the Mutual Security Act of 1952 [June 20, 1952], the number of civilian employees who are United

States citizens, receiving compensation or allowances from the administrative expense appropriations authorized by this Act, employed in the United States and overseas by or assigned to the Mutual Security Agency, or employed by or assigned to the Department of State or the Department of Defense for carrying out programs the appropriations for which are authorized by this Act, and the military personnel assigned to such programs, shall be in the aggregate at least 5 per centum less than the number so employed or assigned on June 1, 1952 * * *: *Provided further,* That after the Director has determined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned.

2. Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390, 5 U.S.C. 861, provides as follows:

Sec. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Comission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That pref-

erence employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

STATEMENT

Petitioner, a former employee of the Mutual Security Agency, has a veteran's preference status in the classified competitive civil service (R. 5-6). On November 27, 1953, he brought suit in the United States District Court for the District of Columbia, claiming that his discharge by the Mutual Security Agency in September 1952 was in violation of his rights under the Veterans' Preference Act of 1944 (R. 5-8). The District Court dismissed his complaint for failure to state a claim upon which relief could be granted (Pet. Ap. 18; R. 9-10), and the Court of Appeals af-

firmed by a divided vote (Pet. App. 18-24; R. 14-21).

The circumstances relating to petitioner's discharge are not in dispute and may be summarized as follows:

On June 20, 1952, Congress passed the Mutual Security Act of 1952, Sec. 7(f) of which (*supra*, pp. 2-3) compelled the Director of the Mutual Security Agency to reduce the number of persons employed in connection with that agency's program to at least five percent below the number employed on June 1, 1952. The Act specified that this reduction was to be effected within ninety days from its enactment, *i.e.*, by September 18, 1952. In compliance with this Congressional directive and pursuant to what he conceived to be his authority under the final sentence of Section 7(f) (*supra*, p. 3), the Mutual Security Director selected petitioner as one of those whose employment should be terminated. Consequently, petitioner was discharged on September 17, 1952, without regard to the reduction in force procedures prescribed by the Civil Service Commission pursuant to the Veterans' Preference Act of 1944. (R. 5-6.)

Thereupon petitioner filed an appeal to the Civil Service Commission alleging that his discharge had been illegal because it was not in accord with civil service regulations established pursuant to the Veterans' Preference Act (R. 6-7). The Commission sustained the action of the agency director and dismissed petitioner's appeal (R. 7) on the ground that his discharge was effected under the

terms of the Mutual Security Act, that the Act gave the director discretion to select those who would be retained after the prescribed reduction in force, and that the Commission's regulations and the Veterans' Preference Act were thus inapplicable to petitioner's dismissal.

Petitioner then brought this action in the District Court seeking to have his discharge set aside and to obtain reinstatement (R. 5-8). The District Court dismissed the complaint (Pet. App. 18; R. 9-10) rejecting the contention that there was "any ambiguity in the right afforded to the director to determine the individual employees who shall be retained" (Pet. App. 17; R. 12).

On appeal, the Court of Appeals affirmed (per Washington, J.), holding that the language of the Mutual Security Act established a procedure which was inconsistent with the Veterans' Preference Act so that the latter Act was here inapplicable (Pet. App. 18-23; R. 14-19). The Court of Appeals added that if there were any doubt, recourse should be made to the legislative history of the Mutual Security Act which revealed a clear Congressional purpose that the director would have discretion in selecting the personnel to be discharged, without reference to pre-existing statutes, regulations, or procedures for reduction in force (Pet. App. 20-23; R. 17-19). Judge Prettyman dissented on the ground that, as he read the language of the Act, Congress intended the director to bring about the prescribed reduction in conformity with then existing procedures, including

those adopted pursuant to the Veterans' Preference Act, rather than by exercising his own discretion (Pet. App. 23-24; R. 19-21).

ARGUMENT

The Director of Mutual Security, the Civil Service Commission, the District Court and the Court of Appeals have all held that the special five percent reduction in force ordered by Congress in the Mutual Security Act of 1952 did not have to be made in conformity with the veterans' preference regulations and other Civil Service Commission requirements, in view of the specific proviso of Section 7(f) of the Act (*supra*, pp. 2-3) that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned". That administrative decision, concurred in by both courts below, is correct, and there is no merit to petitioner's contention that this holding involved a misapplication of accepted principles of statutory construction. Furthermore, the question here presented has no general or present importance, depending upon the particular language of an Act which was operative only for a short period in 1952. Thus there is no occasion for review by this Court.

1. Petitioner's contention (Pet. 5-7) that he could be discharged only in accordance with the reduction in force regulations of the Civil Service Commission, even under this special statutory reduction program, simply ignores the express language of Section 7(f) of the Mutual Security Act (*supra*, pp. 2-3). Congress recognized that the

extraordinary forced reduction in personnel ordered in the Act might well impair the operations of this important agency, if the traditional reduction procedures were applied. Therefore, in order to permit the retention of the most valuable employees, regardless of their seniority or preferences, the usual methods were temporarily suspended for this particular agency, the Act providing that "the determination as to which individual employees shall be retained shall be made by the head of the agency concerned".

The Veterans' Preference Act, and the Civil Service Commission regulations promulgated thereunder, leave virtually no choice to the head of an agency "as to which individual employees shall be retained" in effecting a reduction in force, since the regulations rigorously govern the determination, once a reduction in force is decided upon. 12 F. R. 2849, 5 C.F.R. part 20; see *Elder* v. *Brannan*, 341 U.S. 277. As the court below pointed out, these regulations are "designed to repose a minimum of power and discretion in agency heads" (Pet. App. 20; R. 16) in selecting those who will be retained. Furthermore, in applying the Commission's regulations, that "determination" amounts to nothing more than a mechanical ordering of the priority and seniority of all employees involved according to a predetermined formula. If Congress had concluded that the agency head should merely administer the Commission's regulations, as petitioner argues (Pet. 13), it seems extremely unlikely that the Act would provide, as

it does, that "the determination" shall be made by the agency head.

Any possible doubt as to the meaning of the critical language is totally eliminated by the legislative history of the Act. The House Committee on Foreign Relations, which drafted this part of the Act, stated in its report (H. Rep. No. 1922, 82d Cong., 2d Sess. p. 68):[1]

> Unless care were taken in writing this amendment, the last employed would be the first discharged. This was not the primary objective of the amendment. The committee was desirous of eliminating the drones. It therefore gave careful attention to the language of the proviso. In order that the reduction may be carried out without any loss of effectiveness the Director for Mutual Security is to distribute the cut among the various agencies. The head of each agency is thereafter to determine in his own discretion which employees he will retain as most capable of carrying out the program, *without regard to existing statutes, regulations and procedures for reduction in force.* [Emphasis added.]

We have been unable to find any statement in the Senate or Conference Committee reports or in the floor debates relating to the proposed legislation which is in any way at odds with this interpretation.

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[1] Addtional supporting statements from the Committee Report are included in the opinion of the Court of Appeals below (Pet. App. 21-22, R. 17-18).

2. Petitioner urges that the decision of the Court of Appeals conflicts with numerous rulings of this Court that statutory repeals by implication are not favored (Pet. 11-14). However, this is not in any sense an instance of statutory repeal, by implication or otherwise; rather, the Mutual Security Act of 1952 established a limited temporary exception from the statutes and regulations governing reductions in force, which otherwise remain in full force and operation. The exception was limited in time to ninety days and in scope to federal employees involved in the Mutual Security Agency program. During the ninety days the Act affected only that particular group of employees, and after the ninety days it had no further effect. In enacting such special limited or temporary exceptions, it is not at all unusual for Congress to omit references by name to outstanding legislation that may be affected for a short time or in a small percent of cases. See *e.g.*, Department of State Appropriation Act of 1947, 60 Stat. 446, 458; Department of State Appropriation Act of 1951, Sec. 1213, 64 Stat. 768; Department of Commerce Appropriation Act of 1952, Sec. 304, 65 Stat. 586, 594.

Moreover, even if this were to be considered a case of statutory repeal by implication, the Court of Appeals recognized and applied the rule of construction established by this Court. Both the majority and dissenting opinions (Pet. App. 19, 23; R. 15-16, 19-20) point to the rule that repeals by implication are avoided were possible; the difference between the opinions is based on a variance

in the judges' interpretations of the Act's provision that "the determination * * * shall be made by the head of the agency concerned". The majority, on the one hand, concluded that the phrase meant that he shall make that determination "within his discretion" and that it was therefore incompatible with the Veterans Preference Act procedures. The dissenting judge, on the other hand, interpreted the phrase to mean that he shall make that determination in accordance with existing procedures (but see *supra*, pp. 7-10), so that he found no conflict with the Veterans' Preference Act. Thus the decision below turns on the particular language of this special Act and not upon the general rule of construction to be applied. This is emphasized by the numerous decisions of this same Court of Appeals that have applied the recognized principle, which petitioner urges as a basis for certiorari.[2] See *e.g.*, *Sims* v. *Rives*, 84 F. 2d 871 (C.A.D.C.), certiorari denied, 298 U. S. 682; *Ritholz* v. *March*, 105 F. 2d 937 (C.A.D.C.).

3. The decision below has no general significance because it depends on the particular language of this special Act and because the pertinent statutory provision was operative for a very short period

[2] Petitioner also argues that further review is required because of the importance of veterans' rights generally (Pet. 8-9). Certainly the great multitude of cases relating to various veterans' benefits militates against review by this Court of every such action. Similarly, it would be impractical for this Court to review every non-unanimous decision by the Court of Appeals for the District of Columbia Circuit in cases which must be brought in that Circuit, as petitioner suggests (Pet. 14-15).

more than three years ago. At most, approximately 1,000 federal employees were affected during that ninety day interval. See H. Rep. No. 1922, 82d Cong., 2d Sess. p. 67. Our review of the docket indicates that not one other suit of this type has been filed in the District Court, and any new suits brought at this time would be barred by laches. Cf. *Norris* v. *United States*, 257 U.S. 77; *Grasse* v. *Snyder*, 192 F. 2d 35 (C.A.D.C.). Petitioner contends that the statutory phrase involved here is commonly used by Congress, but he is able to suggest only one other piece of legislation where the language was at all similar, *i.e.* Small Business Act of 1953, Sec. 218(b), 67 Stat. 232, 239, 15 U.S.C. (1952 ed., Supp. II) 647(b).[3]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1956.

[3] That Act provides: "The President may also provide for such transfers of records, property, and personnel from the Small Defense Plants Administration, during the period of its liquidation, as he considers appropriate to assist the Small Business Administration in carrying out its functions under this title."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 [illegible]



In The

Supreme Court of the United States

October Term 1955

No. 637

John D. Myers,
Petitioner,

vs.

John B. Hollister,
Director,
International Cooperation Administration,
Philip M. Young,
Chairman,
and
George M. Moore,
Frederick J. Lawton,
Commissioners,
United States Civil Service Commission
Respondents.

PETITION FOR RECONSIDERATION TO ALLOW TIME FOR SIMILAR CASES TO REACH THIS COURT

Petitioner asks that the present Petition for Reconsideration be held in inactive status until similar cases now in the courts below can be presented here. If this Court will thus retain jurisdiction over the present case, it will soon become evident to this Court that the question presented by this litigation is of continuing and general importance in Federal law.

There are at least three cases now in the lower courts which are similar to the present litigation. Two are in the Court of Appeals (see note 10, page 10, of the Petition), and one is in the District Court. The one in the District Court (**Moses v. Dulles,** cited on page 9 of Petitioner's "Reply Brief" herein) is legally indistinguishable from the present case. Although the statute in **Moses v. Dulles** was enacted in 1953 while the statute in the present case was enacted in 1952, the language is substantially identical in both instances. The repeated use by Congress of the same statutory language is proof of the continuing legal importance of that language.

It would be manifestly unfair for the present Petitioner to fail in his plea for relief at this time only to have others at a subsequent time prevail upon facts which are legally indistinguishable. To avoid such an unjust result this Court need only grant the present request.

Relief of a nature analogous to that now requested was provided by this Court in **Stone v. White** (1st Cir.—1937) 301 US 532. In that case, certiorari was granted long after the original petition was denied, 296 US 596. It is true that in **White v. Stone** this Court granted certiorari (by allowing a "motion for leave") after an inter-circuit conflict developed. It is equally true, however, that inter-circuit conflict is not a prerequisite to certiorari. Thus, after certiorari was denied in **Paramount Corp. v. Tri-Ergon Corp.** on October 8, 1934, 293 US 587, the brief for reconsideration made it clear that inter-circuit conflict was not to be expected in that case; and, on November 5, 1934, certiorari was granted in that case, 293 US 528.

Possibly this Court will wish to grant certiorari in this case at the present time, for it may be that the Reply Brief herein filed with the Clerk (which reached the Court after the present case had been taken into confer-

ence) has not yet received the full consideration of the Court.

Respectfully submitted,

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CERTIFICATION: Counsel, by his signature hereto, certifies that this Petition for Reconsideration is filed in good faith and not for purposes of delay.

CHARLES F. O'NEALL